

PREPARATION OF LOCAL MANDATE DETERMINATIONS AND COST ESTIMATES FOR EXECUTIVE REGULATIONS AND ORDERS

GENERAL (Revised 5/98)

6601

This and the following sections comply with the requirements of Government Code Section 11357, as added by Chapter 327, Statutes of 1982, by prescribing procedures to be followed by state agencies when developing estimates of the potential costs and/or savings which any local, state, and/or federal agency may incur as the result of a regulation which a state agency proposes to issue. Sections 11346.5 (a) (5) and (6) respectively require that, prior to the issuance of an executive regulation, the following information be prepared by the state agency proposing to issue the regulation:

- 1.1. A determination as to whether the regulation imposes a mandate on local agencies or school districts and, if so, whether the mandate requires state reimbursement pursuant to Part 7 (commencing with Section 17500 of Division 4).
- 2.2. An estimate, prepared in accordance with instructions adopted by DOF, of the cost or savings to any state agency, the cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4, other nondiscretionary costs or savings imposed on local agencies, and the cost or savings in federal funding to the state.

For purposes of this paragraph, "cost or savings" means additional costs or savings, both direct and indirect, that a public agency necessarily incurs or realizes in reasonable compliance with a regulation.

This estimate, which is summarized on Fiscal Impact Statement form, STD. 399, is required to be included in the "notice of proposed adoption" for routine regulations or in the "finding of an emergency" for proposed emergency regulations. The calculations and assumptions of fiscal impact for the current year and two subsequent fiscal years must be attached to STD. 399.

If the state agency finds that the mandate is not reimbursable, it must state the reasons for that finding in the "Final Statement of Reasons" for adopting the regulation, as required by Section 11346.9 (a) 2.

DEFINITION OF REGULATION (Revised 2/98)

6602

Section 11342 (g) provides the following definition of "regulation":

"Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order or standard adopted by any state agency to implement, interpret or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of the state agency.

"Regulation" does not mean or include legal rulings of counsel issued by the Franchise Tax Board or State Board of Equalization, or any form prescribed by a state agency or any instructions relating to the use of the form, but this provision is not a limitation upon any requirement that a regulation be adopted pursuant to this part (i.e., the Administrative Procedures Act) when one is needed to implement the law under which the form is issued.

Specifically, whether the action of a state agency constitutes a regulation does not depend on the designation of the agency, but on its effect and impact on the public. When the effect of material presented in a form is to interpret, implement or make specific the law enforced or administered by the agency which issues the form, the material is a "regulation."

CONTENTS OF FISCAL IMPACT STATEMENT (FIS) **(Revised 12/01)**

6603

Except for the exclusions set forth in the preceding definition, every other type of directive is a "regulation" and must include a "local mandate determination" and an estimate of fiscal impact on:

Local Government

1. Any costs which must be reimbursed pursuant to Section 6 of Article XIII B of the Constitution and Part 7 (commencing with Section 17500) of Division 4 of the Government Code. See Government Code Section 17514 and SAM Section 6620.
2. Any costs which are not reimbursable under that provision of the Constitution but which will necessarily be incurred in reasonable compliance with the regulations.
3. Any savings.

State Agencies

1. Any costs that necessarily will be incurred in reasonable compliance, administration, implementation, and/or enforcement.
2. Any savings.

Federal Funding to the State

- 1.1. Any additional funding required.
2. Any reduction in such funding.

The required estimate must include a definitive statement on each of these items. For example, even if there are no resultant reductions in or savings of federal funds, that fact must be so stated and reported. Each of the items is further defined and explained, along with suggested methodologies for developing estimates of "costs" and "savings," in the succeeding sections.

DEFINITIONS
(Revised 5/98)

6610

For the purposes of implementing these guidelines, the following definitions apply:

Agency, Local. Any city, county, special district, authority, or other political subdivision of the state.

Agency, State. Every office, officer, department, division, bureau, board, council, or commission in state government. Unless otherwise specifically indicated, "state agency" does not include an agency in the judicial or legislative branches of state government.

Costs. All additional expenses for which either supplemental financing or the redirection of existing staff and/or resources (with or without the need for supplemental funding) is required.

Direct Costs

1. Personnel needed to perform a line function or activity prescribed (expressed or implied) in the regulation.
2. Fringe benefits associated with those personnel, e.g., retirement, OASDI, workers' compensation, etc.
3. Operating expenses associated with those personnel, e.g., if compliance is achieved by contracting with a private vendor.
4. Any additional equipment which will have to be purchased or leased in order to comply with the regulation.
5. Allocation of other personnel-related costs if not otherwise allocated through an indirect cost system. Some agencies may allocate the costs of rent, space, utilities, etc., directly to the personnel involved.

Indirect Costs. Any costs related to the additional personnel or operating expenses described in the preceding which are not directly allocated or assigned to those personnel. They do not include a pro rata share of the costs of any manager or supervisor above the first line supervisors since it is assumed that any such supervisors would be in place whether or not the personnel hired to comply with the regulations were there. For example, if a regulation necessitated the hiring of additional staff in a county welfare department, it would not be appropriate to assign, through an indirect cost system, a portion of the costs of the county welfare director to those new personnel since the director would exist to perform his/her functions even if the new personnel were not hired.

Mandate. A requirement with a consequence of noncompliance of either:

1. A criminal penalty,
2. A civil liability, or

3. An administrative penalty.

Public Agency. Any state agency, city, county, special district, school district, community college district, county superintendent of schools, or federal agency.

Reasonable Compliance. No universal definition is available. However, the "prudent person" test can be utilized to arrive at an appropriate definition of the term. For example, if an agency is required by regulation to provide transportation for certain persons, it clearly would not be appropriate to purchase limousine-type luxury automobiles to do so. On the other hand, it would not be appropriate to provide the service by purchasing tandem bicycles. Reasonable compliance can be achieved with some mode of transportation between the two extremes cited. The issuing agency should evaluate each instance separately and determine what "reasonable compliance" would be. The estimate developed should clearly indicate the mode or level of activity it has assumed would achieve such compliance.

Since "compliance" connotes that the regulation involves a requirement, costs incurred by state or local agencies in exercising any authority granted by a regulation which is permissive or optional are not germane and need not be estimated.

Revenues. Any changes in the amounts of operating income received by state and local agencies as the result of an executive regulation should also be identified. In this context, "revenue" includes taxes, state and/or federal assistance, fees, licenses, and so forth.

Savings. Are both actual budget reductions and the "freeing up" of staff and/or resources for reassignment to other areas of legitimate concern of the agency.

School District. Any school district, community college district, or county superintendent of schools.

Special District. Any agency of the state which performs governmental or proprietary functions within limited boundaries. Special district includes a redevelopment agency, a joint powers agency or entity, a county service area, a maintenance district or area, an improvement district or improvement zone, or any other zone or area. Special district does not include a city, a county, a school district, or a community college district.

County free libraries established pursuant to Chapter 6 (commencing with Section 19100) of Part II of Division 1, Title 1 of the Education Code, areas receiving county fire protection services pursuant to Section 25643 of the Government Code, and county road districts established pursuant to Chapter 7 (commencing with Section 1550) of Division 2 of the Streets and Highways Code shall be considered special districts for all purposes of this section.

Article XIII B, Section 6 of the State Constitution, as added by Proposition 4 (The Gann Initiative) in 1979, contains the following requirement:

Section 6. Whenever the Legislature or any state agency (emphasis added) mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates:

- a. Legislative mandates requested by the local agency affected;
- b. Legislation defining a new crime or changing an existing definition of a crime; or
- c. Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

Government Code Sections 17500 et seq. require the state to reimburse local agencies and school districts for any costs that they are required to incur after July 1, 1980, as a result of, among other things, any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program.

Government Code Section 17516 defines "executive order" as:

Any order, plan, requirement, rule or regulation issued by any of the following:

- a. The Governor.
- b. Any officer or official serving at the pleasure of the Governor.
- c. Any agency, department, board, or commission of state government.
(Exceptions are provided for certain orders of the Water Resources Control Board.)

It is important to note that only those executive regulations which implement state statutes fall within the purview of the Article XIII B requirements. That is, any costs which local entities incur as the result of a regulation which implements a ballot measure approved by the voters, a court order, or a federal directive would not be reimbursable by the state. However, as described below, the issuing state agency is nevertheless required to include an estimate of these non-reimbursable costs.

FUNDING FOR REIMBURSABLE LOCAL COSTS (Revised 5/98)

6621

Pursuant to Government Code Section 17561(b)(1) (B), when a regulation involves reimbursable costs, it "...shall be accompanied by a bill appropriating the funds therefor or, alternatively an appropriation for these costs shall be included in the Budget Bill for the next succeeding fiscal year." Use of the second alternative must receive prior approval of DOF. If an

agency fails to provide appropriate funding, then affected local agencies are authorized to file claims for reimbursement with the Commission on State Mandates.

In order to prepare the "local mandate determination" required by Section 11346.5; i.e., a determination as to whether the regulation imposes a mandate on local agencies or school districts, it is necessary to first answer the following question:

Will the regulation require local entities to undertake a new program or to provide an increased level of service in an existing program?

If the answer to this question is "No," then check either box 4, 5, or 6 in Section A of STD. 399. If the answer is "Yes," it is then necessary to determine if the costs resulting from the mandate are nevertheless not state reimbursable because one or more of the specific statutory exclusions to reimbursability in Government Code Section 17556 which are summarized (a)–(f) under this Section do not apply in situations where the regulation either:

1. Implements a federal mandate;
2. Implements a court mandate;
3. Implements a mandate in a ballot measure approved by the voters;
4. Results from a documented request from the only local entity or entities affected;
5. Provides (or fall within the purview of existing) revenue sources or other financing mechanisms; or
6. Results in savings that are equal to or exceed any costs.

In addition to these statutory exclusions, the courts have held that costs of statutes and regulations are not reimbursable if they:

1. Result from an action undertaken at the option of a local entity (County of Contra Costa vs. State of California, 177 Cal App 3d 62.79 (1986).
2. Are not unique to local government, e.g., affect both the private sector and the public sector (County of Los Angeles vs. State of California et al, 43 Cal App 3d 46 (1987)).

If it is determined that the regulation does not impose a reimbursable mandate on local government, it is still necessary to include a specific statement reflecting that determination in the notice and to develop estimates of any nonreimbursable local costs.

If it is determined that the regulation does impose a reimbursable mandate on local government, then it is important to state precisely what the mandate is. This is normally best accomplished by employing a statement, expressed in mandatory terms, which identifies both the affected local entity or entities by group and the activity that will be required of them, e.g., "county clerks shall provide each polling precinct worker with an American flag," "school districts shall provide each student with a lunch box at no cost to the student," "all local entities shall record on videotape all meetings of their governing bodies." With the mandate so stated, it is then possible to proceed to develop an estimate of its cost to local government.

COST ESTIMATING FORMAT AND METHODOLOGY (Revised 2/98)

6622

A standard methodology has been developed for use in estimating costs in both executive regulations and in legislation. The main components of that methodology are:

1. Statement of the Mandate.
2. Background or Introductory Material.
3. Working Data.
4. Assumptions.
5. Calculations.
6. Conclusion.

Example of these components follow:

Statement of the Mandate

This is described in SAM Section 6621.

Background material

Included here should be:

1. A legal description of the legislation which is the basis for the regulation, e.g., Chapter 1234, Statutes of 1996 (SB 123, Smith).
2. Any other pertinent historical data.

Working Data

Working data are any available statistical data and their sources which would identify the affected universe. (For example: Secretary of State data on the number of registered voters and/or polling places, State Department of Education data on school enrollees, or State Controller's reports for the number of local entities.) Also, any "market place" information or standard costs of items needed to comply with the mandate, e.g., quoted process for forms, lunch boxes, video cameras (either sales, rentals, or contract services). In addition, it is very useful and, in some instances essential, that a representative sampling of the affected entities be contacted and queried as to the impact of the mandate on them. Very often organizations representing the affected entities such as the California State Association of Counties (CSAC) and the League of California Cities can either provide such information directly or identify those local entities most likely to be most affected by and/or able to provide information regarding the mandate's impact on them. Each county has designated a person, usually in the County Executive's Office, as a "local mandate coordinator" for purposes of providing information, upon

request, on pending legislation and handling Commission on State Mandates claims. Those coordinators should also be able to assist in developing fiscal estimates for executive regulations.

Assumptions

On occasion, data regarding the affected universe and/or the price of the mandated item are not readily obtainable. In these instances, it may be necessary to make some reasonable assumptions about the impact. These assumptions should be clearly stated and kept separate from the "hard" data used in developing the estimate.

Calculations

Any mathematical computations using working data and/or assumptions necessary to arrive at a resultant cost figure should be displayed. Costs for both the balance of the current fiscal year and for the subsequent two fiscal years should be developed. Separate calculations should be provided for local, state, and federal costs, as appropriate, as described in the succeeding sections. Any savings to each level of government should be similarly identified.

Conclusion

Determinations made by the issuing agency regarding the applicability of the Constitution to any resultant costs and/or the need to provide additional funding of any state costs. See SAM Section 6621 for the required information.

NONREIMBURSABLE LOCAL COSTS (Revised 5/98)

6623

Local entities may incur costs as the result of the issuance of executive regulations which, while they are not reimbursable because they are not "state mandated costs," must be identified and estimated by the issuing state agencies. These costs will generally result from regulations which fall into one of three categories:

1. Those which implement something other than a state statute, i.e., federal, court or voter-approved mandates. (Section A.2 (a), A.2 (b), or A.2 (c) on STD. 399.)
2. Those which either are requested specifically by only the entity or entities affected, can be financed from other appropriate revenue sources, or provide savings which offset any costs. (Sections A.2 (d), A-2 (e), or A.2 (f) on STD. 399.)
3. Those which are permissive, optional, or discretionary in nature, e.g., "fire engines may be painted yellow" or are not unique to local government.

The basic estimating methodology for the preceding subsections (1) and (2) is essentially the same as that set forth in SAM Section 6622. However, it is important to clearly indicate that these are not constitutionally reimbursable mandates and to develop estimates of offsetting savings and costs. For the permissive regulations described in preceding subsection (3) no estimate of costs is required since only "other nondiscretionary costs" are specified in law. However, there may be occasions where it would be desirable to have an estimate of the costs

that would be incurred if all eligible local entities took advantage of the authority conferred by the regulation.

SAVINGS TO LOCAL ENTITIES
(Revised 2/98)

6624

In a sense, savings result from what might be called "negative" mandates, since local entities are relieved from doing something they were previously required to do. The same basic estimating methodology as described in this section can be employed to determine local savings in state regulations. In fact, it should be relatively simple to derive estimates of savings since affected local entities should be able to identify what they are doing and what the associated costs are. Although not required by statute, any discretionary savings should also be identified since the state would be providing local entities with the option, if they choose to take it, to reduce the cost of government.

INCREASES OR REDUCTIONS IN LOCAL REVENUES
(Revised 2/98)

6625

Although neither the Constitution nor the Government Code specifically require an estimate of any revenue changes at the local level as the result of a state executive regulation, any such impact should be included in the estimate prepared by the issuing agency. Any local revenue losses resulting from state executive regulations are not reimbursable under the "local mandate" law.

FISCAL IMPACT ON STATE GOVERNMENT

COSTS TO STATE AGENCIES (Revised 5/98)

6631

Although there is no specific statutory requirement that a state agency must provide funding for the costs which other state agencies incur as a result of its regulations, it is important to identify any such costs as accurately as possible so that appropriate action to secure any needed additional funding can be taken. Again, the basic methodology for estimating cost is set forth in SAM Section 6622. The primary difference, of course, is that the entities contacted for cost data would be state, rather than local agencies.

Each state agency should carefully review the weekly "California Regulatory Notice Register" published by the Office of Administrative Law in order to determine whether any proposed regulation therein would impact that department. The agency proposing to issue the regulation should be notified of any potential impact. For permissive regulations, each state agency will have to determine for itself whether it wishes to exercise that authority, taking into account all relevant considerations, including the possible need to obtain additional funding.

SAVINGS TO STATE AGENCIES (Revised 2/98)

6632

It is especially important to identify savings to a state agency or agencies when there may be corresponding costs to another state agency, e.g., a transfer of responsibility. Although only nondiscretionary savings must, by statute, be reported, discretionary savings should also be identified so that the total potential magnitude of such savings can be known.

FISCAL IMPACT ON FEDERAL FUNDING OF STATE PROGRAMS (Revised 2/98)

6640

Increase in Federal Funding

Federal funding of state programs could increase as the result of state regulations if the state acts to exercise authority granted by the federal government. Most likely, this would involve programs which have established sharing ratios and the state acts to increase the size of either the client group or the payments themselves. In this context, it is important to distinguish between regulations which implement federal mandates and those which are issued under authority granted by the federal government. It should be noted that recent court cases have held that the threatened loss of federal funds is not equivalent to a federal mandate.

Rather than sampling any affected state and/or local entities, it would be appropriate and acceptable for the issuing state agency to either calculate the increased federal cost (based on an established sharing ratio) or to contact the federal agencies involved for their estimates of any fiscal impact.

Reductions (savings) in Federal Funds

As with increased federal costs, decreases would most likely result for programs involving sharing ratios. The same methodology suggested for estimating federal costs may be employed also for federal savings.

FISCAL IMPACT STATEMENT (FIS)
(Revised 5/98)

6650

A state regulation which relates only to the internal management of the issuing agency or which can be described as a form is not a "regulation" for purposes of the requirements herein pertaining to the preparation of fiscal estimates. Similarly, "regulation" does not include any form prescribed by a state agency or any instructions relating to the use of the form, but this provision is not a limitation upon any requirement that a regulation be adjusted pursuant to the Administrative Procedures Act (APA). Every true regulation must include an estimate and/or determination by the issuing agency of its fiscal effect on governmental agencies. The Fiscal Impact Statement form, STD. 399, has been developed for this purpose. A copy of a completed STD. 399 should be included with each "Notice Publication/Regulation Submission form, STD. 400" when submitting regulations to the Office of Administrative Law (OAL).

Copies of the calculations and assumptions leading to dollar estimates should also be attached. Those calculations and assumptions must address the proposed regulation's fiscal impact in the current fiscal year and in the two subsequent fiscal years. A copy of the local mandate determination and any attachments thereto must be retained by the issuing agency in the rule-making file required by Government Code Section 11347.3. The OAL will not approve regulation filings which do not include a properly completed STD. 399. Instead, OAL is required by Government Code Section 11349.1 (d) to return any regulation to the adopting agency if the adopting agency either:

1. Has not prepared the required cost estimate, including the data, assumptions and calculations on which it is based, and included it in the rulemaking file; or
2. Has prepared the required estimate and concluded that the costs of the regulation to local government will be reimbursable, but the adopting agency fails to either:
 - a. Cite an appropriate Budget Act item or chaptered bill as a source of reimbursement funding; or
 - b. Attach a letter or other documentation from DOF which states that DOF has approved a request to include funding in the next Governor's Budget and Budget Bill or has authorized an augmentation of the agency's Budget Act appropriation in an amount sufficient to reimburse local entities for their cost mandated by the regulation.

ESTIMATES WHICH REQUIRE DOF ACTION
(Revised 2/98)

6660

Government Code Section 11357 (c) specifically authorizes DOF to "...review any estimate...for content including, but not limited to, the data and assumptions used in its preparation."

A state agency is not required in all instances to obtain the concurrence of DOF in its estimate of the fiscal effect of its proposed regulation on governmental entities. However, such concurrence is required for those estimates which contain any of the following elements, as depicted on STD. 399:

- A.1—Reimbursable Local Costs
- B.1—State Costs
- A.2—Non-Reimbursable Local Costs
- B.2—State Savings
- A.3—Local Savings

In addition, DOF's approval is required for the inclusion in any such estimate of any statement to the effect that reimbursement of local costs will be requested in a subsequent Governor's Budget, A.1 (b) on STD. 399.

Requests for DOF's concurrence in or approval of a cost estimate for a proposed executive regulation should be forwarded to the DOF Principal Program Budget Analyst assigned to the issuing state agency at least 30 days prior to the date on which the "notice of proposed adoption" or "finding of an emergency" is proposed to be issued. Questions regarding any technical aspects of the state mandate law should be directed to that DOF analyst.

**INPUT FROM OTHER GOVERNMENTAL AGENCIES IN
THE DEVELOPMENT OF FISCAL ESTIMATES
(Revised 2/98)**

6670

State agencies which propose to issue regulations should allow for input from any and all other governmental agencies which express concern about the potential fiscal impact of the regulation on them. Such input should be solicited by the issuing agency by all means practical, including public hearings, OAL's California Regulatory Notice Register, and any other appropriate means.

Although DOF concurrence is required only for those circumstances set forth in SAM Section 6660, such concurrence may be requested for any other circumstances as well. When DOF has concurred in the fiscal estimate, DOF will, if requested, be primarily responsible for providing evidence and testimony to the Commission on State Mandates on any claim from local government that the estimate is not accurate. Conversely, the issuing state agency will be primarily responsible in instances where DOF's concurrence was not obtained.

Executive Order W-144-97 requires the development of an economic impact statement (EIS) to be included in each rulemaking record. The EIS has been added to the STD. 399 form. State agencies must include a completed STD. 399 form with each proposed regulation that is submitted to the OAL for publication in the California Regulatory Notice Register.

The STD. 399 form must be approved and signed by the Agency Secretary. The form must also be signed by the appropriate Program Budget Manager in the DOF if there are fiscal impact disclosures required by SAM Section 6600-6670, in which case the Fiscal Impact Statement (FIS) portion of STD. 399 is to be completed. State boards, offices, or departments not under an Agency Secretary must have the form signed by the highest ranking official in the organization. A copy of the completed STD. 399 must be sent to the Trade and Commerce Agency, Regulation Review Unit (RRU) at the address below when the original is submitted to OAL.

The RRU is responsible for reviewing the economic impact portion of the STD. 399 for each proposed regulation. The DOF reviews and concurs with the fiscal impact portion of the STD. 399 but only examines the economic impact statement for its possible fiscal impacts on governmental entities.

Questions on the EIS should be directed to the RRU, while questions on the FIS should be directed to the DOF budget analyst for the agency.

Further information and detailed instructions for completing the EIS are available at:

California Trade and Commerce Agency, Regulation Review Unit
801 K Street, Suite 1700, Sacramento, CA 95814
Website <http://commerce.ca.gov/regreview>
Telephone: (916) 322-3539
Fax (916) 322-0669